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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JARVIN O'NEAL NASH, Defendant and Appellant.	E063347 (Super.Ct.No. FSB045154) OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Pacheco, Judge. Affirmed.

Jarvin O'Neal Nash, in pro. per.; and Marianne Harguindeguy, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

This is defendant and appellant Jarvin O'Neal Nash's third appeal. This current appeal stems from an order of the trial court denying defendant's petition to recall his indeterminate life sentence and for resentencing of his first degree attempted burglary

conviction as a misdemeanor under Penal Code section 1170.18.[1] We find no error and will affirm the order.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

At approximately 9:00 a.m., on July 16, 2004, the victim was in bed when she heard the doorbell ring numerous times. When she looked through her front door's peephole, she saw a white female juvenile whom she did not know and did not open the door. As the victim was preparing to take a shower, she heard a disturbance outside and went to investigate. She saw defendant, an adult black male, two male juveniles, and the female attempting to break her backyard living room sliding glass window. The victim noticed that the sliding glass door was off the track. The victim screamed and defendant and his cohorts fled.

The victim contacted police and provided them with a description of the suspects. Defendant and his cohorts were located, and the juveniles admitted to being at the residence. The two male juveniles reported they were at high school when defendant contacted them. They then picked up defendant and the female juvenile. Two backpacks were also located, one containing two screwdrivers. After waiving his constitutional rights, defendant admitted to being at the victim's residence but denied attempting to break in.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the probation officer's report.

Investigation revealed that the living room sliding glass window had been forced up off of the track and pry marks were located on the frame of the glass window. The sliding glass window screen had been removed. Officers also found damage to a portion of the fence and footprints at the scene. The screwdrivers found in the backpacks were consistent with damage to the aluminum frame of the window.

Following a jury trial, on October 13, 2004, defendant was convicted of attempted burglary. (§§ 664/459.) The jury also found true that a person was present in the residence during its commission. In a bifurcated trial, the trial court found true that defendant had suffered two prior serious or violent felony strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), to wit, two 2003 first degree burglary convictions.

Defendant subsequently sought to file a motion for new trial. On June 20, 2005, defendant's trial counsel informed the court that no grounds for a motion were found.

On December 20, 2005, after the trial court denied defendant's motion to dismiss his prior strike convictions, defendant was sentenced to 25 years to life under the "Three Strikes" law for the attempted burglary. Defendant was awarded 523 days credit for time served.

After defendant appealed, in a nonpublished opinion, this court affirmed defendant's conviction. (See *People v. Nash* (July 12, 2007, E039565) [nonpub. opn.] (hereinafter *Nash I*).)

On November 6, 2012, the electorate passed Proposition 36, also known as the Three Strikes Reform Act of 2012 (the Reform Act). Among other things, this ballot

measure enacted section 1170.126, which permits persons currently serving an indeterminate life term under the Three Strikes law to file a petition in the sentencing court, seeking to be resentenced to a determinate term as a second striker. (§ 1170.126, subd. (f).) If the trial court determines, in its discretion, that the defendant meets the criteria of section 1170.126, subdivision (e), the court may resentence the defendant. (§ 1170.126, subds. (f), (g).)

Defendant subsequently filed a petition to recall his indeterminate life sentence pursuant to section 1170.126. On October 30, 2014, the trial court denied defendant's petition, finding defendant ineligible for resentencing under section 1170.126, subdivision (e), due to his current commitment offense for attempted first degree burglary, which is a serious felony.

On November 4, 2014, voters enacted Proposition 47, entitled "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47). It went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) As of its effective date, Proposition 47 classifies as misdemeanors certain drug- and theft-related offenses that previously were felonies or "wobblers," unless they were committed by certain ineligible defendants. (§ 1170.18, subd. (a).)

After defendant appealed, appellate counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738. Defendant also filed a personal supplemental brief. (See *People v. Nash* (April 9, 2015, E062644) [nonpub. opn.] (hereafter *Nash II*).) In the brief, appellate counsel listed as potential

arguable issues whether the trial court erred in concluding that defendant was ineligible for recall of his sentence under section 1170.126 and whether, in light of Proposition 47, defendant's current conviction should be reduced to a misdemeanor. In his supplemental brief, defendant asserted that the facts surrounding his current offense justify his resentencing under section 1170.126 and under Proposition 47.

In a nonpublished opinion filed on April 9, 2015, this court affirmed the trial court's finding and held, "Because defendant's current offense was for attempted first degree burglary, the trial court did not err in concluding that he was ineligible for recall of his sentence under section 1170.126." (*Nash II, supra,* E062644, p. 3.) This court also rejected defendant's Proposition 47 argument, finding defendant ineligible under section 1170.18 because Proposition 47 did not apply to the crime of first degree burglary. (*Nash II, supra*, E062644, p. 3.) This court also concluded, "Given the foregoing, the facts surrounding defendant's current crime are irrelevant to the determination that he is ineligible for a recall of sentence under either sections 1170.126 or 1170.18." (*Id*. at p. 4.)

On January 6, 2015, defendant filed a petition to reduce his attempted first degree conviction to a misdemeanor and for recall and resentencing pursuant to section 1170.18. On March 6, 2015, the trial court found defendant was ineligible.

Defendant again appeals.

II

DISCUSSION

After defendant appealed, upon his request, this court appointed counsel to represent him on appeal. Counsel has filed a brief under the authority of *People v. Wende*, *supra*, 25 Cal.3d 436 and *Anders v. California*, *supra*, 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this court to conduct an independent review of the record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so.

In appellate counsel's brief before this court, counsel argues as potential issues whether this court had appellate jurisdiction in defendant's prior appeal to consider defendant's proposition 47 resentencing eligibility and whether defendant's current conviction for attempted first degree burglary is eligible to be reduced to a misdemeanor under section 1170.18.

In his supplemental brief, as he did in his prior appeal, defendant argues that the facts surrounding his current offense justify reduction of his conviction to a misdemeanor, and therefore the matter must be remanded for "a qualification hearing to determine whether [he] would pose an unreasonable risk" of danger. He also appears to relitigate his conviction, arguing that he was innocent of the crime of attempted residential burglary, he was denied his constitutional rights to due process and a fair trial, the state failed to prove beyond a reasonable doubt every element of the charged offense,

the state improperly used his prior burglary convictions to prove specific intent in committing his current conviction, and his sentence constitutes cruel and unusual punishment.

Assuming, without deciding, this court did not have jurisdiction to consider defendant's Proposition 47 argument in his prior appeal, we find defendant ineligible for resentencing of his first degree attempted burglary conviction as a misdemeanor under section 1170.18. Proposition 47, embodied, in part, in section 1170.18, provides, as is pertinent here, "(a) A person currently serving a sentence for a conviction . . . of a felony . . . who would have been guilty of a misdemeanor under the act . . . had this act been in effect at the time of the offense may petition for a recall of sentence . . . to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Sections 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." None of those sections apply to the crime of first degree burglary, therefore, defendant is not eligible for resentencing under section 1170.18.

We also reject defendant's remaining contentions relating to his current conviction for attempted first degree burglary. Defendant has been afforded all the constitutional protections of a first appeal right to challenge any issues relating to his conviction, including challenging the sufficiency of the evidence and whether he had obtained a fair trial. That judgment has long since been final. Collateral estoppel bars relitigation of issues pertaining to his attempted first degree burglary conviction. (*People v. Lawley*

(2002) 27 Cal.4th 102, 163; *People v. Scott* (2000) 85 Cal.App.4th 905, 919.) Accordingly, defendant is precluded from collaterally attacking the judgment.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the entire record for potential error and find no arguable error that would result in a disposition more favorable to defendant.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.